UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

SHELIA DENNISON,	)	
	)	
Plaintiff	)	
	)	
	)	
v.	)	Civ. No. 00-266-B-S
	)	
PRISON HEALTH SERVICES, et al.,	)	
	)	
	)	
Defendants	)	

RECOMMENDED DECISION ON MOTIONS TO DISMISS AND MOTION TO AMEND 42 U.S.C. § 1983 COMPLAINT

Plaintiff Shelia Dennison has filed a 42 U.S.C. § 1983 complaint against multiple defendants. (Docket No. 1.) On March 20, 2001, she filed an amended complaint. (Docket No. 2.) The defendants have answered the amended complaint. (Docket Nos. 6 & 15.) Before the court are two motions to dismiss the amended complaint: one filed by Defendants Scott Chandler and Carol Harvey (Docket No. 4) and one by Defendants Prison Health Services, Kim Partridge, and Debra Hartley (Docket No. 8). Also before the court is Dennison's motion to amend her amended complaint. (Docket No. 13.) I now recommend that the Court **DISMISS AS MOOT** the pending motions to dismiss and **GRANT** Dennison leave to amend her amended complaint.

Background

Dennison's first amended complaint asserts claims for damages and injunctive relief based upon the alleged deliberate indifference and due process violations committed by the defendants, all employees and private contractors of the Maine

Department of Corrections. At the time she filed her complaint Dennison was a prisoner in the state prison system. She alleges that she has serious medical conditions and defendants have failed to provide her adequate medical care. She also alleges that Prison Health Service, Inc. has caused the medical care for some fifty-plus inmates to be billed to her account in her name.

Both the state defendants and the private defendants filed motions to dismiss pursuant to 42 U.S.C. § 1997e (provision of the Prison Litigation Reform Act of 1995, hereinafter the "PLRA") asserting that Dennison's complaint fails to state a claim because she has not alleged exhaustion of administrative remedies available to her within the prison facility. Both defendants maintained that exhaustion of administrative remedies was required even when the complaint sought as its primary remedy a monetary damage award. Plaintiff responded by citing Second Circuit precedent to the effect that a suit for monetary damages did not equate with a challenge to "prison conditions" requiring administrative exhaustion under § 1997e. See, e.g., Lawrence v. Goord, 238 F. 3d 182, 186 (2d Cir. 2001) (retaliation); Nussle v. Willette, 224 F.3d 95, 99-106 (2d Cir. 2000) (excessive force). Whatever merit plaintiff's argument might have had at the time she filed her response, the United State Supreme Court ruled on May 29, 2001, in Booth v. Churner, 532 U.S. ---, 121 S.Ct 1819 (2001), that exhaustion is required under § 1997e even if only monetary relief is sought and even if that remedy is not available administratively.

The expected implication for this dispute of Booth would be that defendants' motions to dismiss should be granted. However, two intervening circumstances have arisen which have significantly changed the posture of this case. On May 25, 2001,

Dennison filed a motion to allow leave to file a second amended complaint which alleged *inter alia* that the actions of the employees of the Department of Corrections had made the grievance procedure unavailable to her because of her transfer; that the private defendants do not have a grievance procedure available to her; and that, in any event, Dennison had now filed grievances administratively. The second intervening circumstance, not disputed by defendants, is that on June 8, 2001, Dennison was released from prison.

Plaintiff's Release from Incarceration

Although not cited by any party in their initial submissions, there is case law in this District addressing the identical issue raised by the motions to dismiss. In Murphy v. Magnusson, 1999 WL 615895 (D. Me. 1999) Judge Carter addressed the Booth issue and determined, as the United State Supreme Court recently announced, that § 1997e(a) requires exhaustion of administrative remedies even when the grievance procedure does not provide for the relief sought – monetary damages. Id. *1 - *3. However, Judge Carter also noted that once a plaintiff has been released from custody his or her status vis-à-vis the PLRA changes. Relying upon Kerr v. Puckett, 138 F.3d 321, 323 (7th Cir. 1998) (permitting complaint, sans exhaustion, filed after plaintiff was released from confinement), Judge Carter noted that the plain language of the PLRA applies to one who is "confined," "incarcerated," or "detained" in a correctional facility. Murphy, 1999 WL at *3. Once a prisoner has been released from custody "there is no longer any administrative agency to apply its special expertise to Plaintiff's claim." Id. The Court reasoned that since plaintiff could refile his claims without exhausting administrative remedies, it would not serve judicial efficiency to dismiss the then pending complaint for

failure to exhaust administrative remedies. Id. at *3 (rejecting recommendation of magistrate judge that the case be dismissed for failure to exhaust administrative remedies entered just prior to the plaintiff's release from prison).

Since Judge Carter's decision the Eleventh Circuit has published a divided en banc decision addressing § 1997e(e)'s physical injury requirement for prisoners and a complaint filed while the plaintiff was incarcerated but which was acted on by the district court after six of the eleven plaintiffs were released from custody. Harris v. Garner, 216 F.3d 970 (11th Cir. 2000). The six-judge majority of the twelve-member panel held that the § 1997e(e) physical injury requirement applies to suits filed while a plaintiff is in prison but decided after a plaintiff's release. Id. at 972, 985 (Carnes, J.). It reasoned that § 1997e(e)'s "'brought' and 'bring' refer to the filing or commencement of a lawsuit, not to its continuation." Id. at 974. See also id. at 973-79 (drawing on court interpretations of these words in other statutes and within the PLRA including § 1997e(a), and giving into the "temptation" to set out congressional history of the provision). The majority stated that a motion to amend or to supplement to allege the release of a plaintiff would have no bearing on the necessity that the complaint be dismissed. Id. at 980-84.[1] It rejected an argument that § 1997e(e) no longer "applies" to a complaint once a plaintiff sheds prisoner status. Id. at 982 n.12. However, the court concluded that the dismissal under § 1997e(e) must be without prejudice to a plaintiff's right to refile the complaint as a non-prisoner. Id. at 980, 985.

[1] Chief Judge Anderson wrote a special concurrence, casting a seventh vote to the majority result and "much of the reasoning." Id. at 985. Favoring routine dismissal of prisoner suits that do not comply with § 1997e(e), Judge Anderson argued that in some instance Federal Rule of Civil Procedure 15(d) might be utilized to allow a supplemental pleading at the discretion of the district court judge in "some of the more unusual circumstances" identified by the dissent. Id. at 985-86.

The four-member part concurrence/ part dissent reasoned that once a plaintiff is released from prison § 1997e(e) no longer applies to the pending complaint and the demands and limits it place on the pleadings of the plaintiff disappear. Id. at 986 (Tjoflat, J., concurring in part and dissenting in part). It observed that the majority's dismissal fiat would require the courts to dismiss the prisoner-lodged complaint seeking compensatory and punitive damages for non-physical injury no matter what stage the case had reached when the plaintiff was released. Id. at 986. This approach, requiring the newly-freed-plaintiff and defendant(s) to start afresh would needlessly strain the resources of the court and the parties while doing nothing to curtail prisoner filings, as the refiling would be by a non-prisoner. Id. at 986, 999-1002, 1004. In the opinion of these four panel-members, courts ought to observe "the normal rules of pleading" and permit newly released plaintiffs to supplement their pleadings to reflect the fact of their release and any nonphysical injury. Id. at 989-99, 1002.

After consideration of the majority opinion in Harris, I conclude that Judge Carter's Murphy and the Harris dissent is more persuasive in this case. Following the analysis and disposition in Murphy, the failure of Dennison to allege that she has exhausted her administrative remedies is no longer a frailty of the complaint because the § 1997e(a) exhaustion requirement is no longer applicable to Dennison's complaint. And the necessity of exhaustion issues raised by defendants' motion to dismiss, although now definitively resolved in their favor by Booth, is moot as applied to this case.

Motion to Amend

Pursuant to Federal Rule of Civil Procedure 15(a), leave to amend a complaint should be freely given. Forman v. Davis, 371 U.S. 178, 182 (1962) (" In the absence of

any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given'") (quoting Federal Rule of Civil Procedure 15(a)).

Although Dennison now argues that the PLRA no longer applies to her and that therefore she need not plead nor prove that she has exhausted administrative remedies, her proposed amended complaint does set forth allegations relating to the unavailability of grievance procedures against the private defendants and the actions of the corrections personnel with respect to her attempted use of the grievance process. The private defendants have voiced no opposition to the proposed amendment. The State defendants have opposed the motion to amend by making factual assertions that go to the merits of the allegations raised by Dennison. Such issues are better addressed on a summary judgment record than on these pleadings.

I am satisfied that under the established precedent in this District it would be inappropriate for me to recommend that the complaint be dismissed in its entirety because Dennison is no longer incarcerated. The better course of action is to grant leave to amend the complaint as requested. See Fed. R. Civ. Proc. 1 ("[The Federal Rules of Civil Procedure] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.") However, to avoid the need to treat a third amendment I recommend that Dennison be allowed ten days from the date that this recommended decision becomes final to file an amended second amended complaint in

light of the evolving facts in this case and this decision with regard to the applicability of § 1997e(a).[2]

Conclusion

For the forgoing reasons I **RECOMMEND** that the defendants' motion to dismiss be **DENIED** because they are **MOOT**. I further **RECOMMEND** that Dennison be **GRANTED** leave to file an **AMENDED COMPLAINT**. If Dennison would like to amend her amended complaint she has ten days from the date this order becomes final.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

July 6, 2001.

Margaret J. Kravchuk
U.S. Magistrate Judge

PR1983

U.S. District Court

District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 00-CV-266

DENNISON v. PRISON HEALTH SERVIC, et al Filed: 12/26/00

Assigned to: Judge GEORGE Z. SINGAL Jury demand: Both

[2] This is not to suggest that Dennison ought to jettison her allegations regarding her efforts at exhaustion contained in the second amended complaint currently on the table or that the fact that she is no longer incarcerated must be specifically pled. However, counsel should be given the opportunity to provide a proposed amended complaint that fully sets forth whatever facts are deemed pertinent.

Demand: $0,000 Nature of Suit: 550

Lead Docket: None Jurisdiction: Federal Question

Dkt# in other court: None

Cause: 42:1983 Prisoner Civil Rights

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plaintiff [COR LD NTC]

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v.

PRISON HEALTH SERVICE INC JAMES E. FORTIN, ESQ.

defendant [COR LD NTC]

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DEBRA, LPN

defendant

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ERIC HANSEN

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